IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No. 75 of 1995

Date of decision 2.1.2007

Kauran Devi **…Appellant.**

Versus

Amar Nath and others **…Respondents.**

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.

Whether approved for reporting?

For the appellant: **Mr. R.K. Gautam, Sr. Advocate, with Mr. Naveen Bhardwaj, Advocate.**

For respondents : **Mr. Shrawan Dogra, with Ms. Monika, Advocates, for respondents No. 1 to 6**

Surjit Singh, Judge (Oral)

This regular second appeal was admitted on the following substantial question of law on 24.3.1995:-

> "Whether the findings of the learned lower appellate court that the order of the Assistant Collector Ist Grade dated 14.2.1978 in redemption of mortgage proceedings against the minor (appellant) who was not represented before the Collector, is a valid order is legal and in accordance with law?"

Whether reporters of Local Papers may be allowed to see the Judgment?

2. Facts, relevant for the disposal of the appeal, may be noticed. Appellant Kauran Devi and proforma respondents No. 8 to 13, all of them hereinafter referred to as plaintiffs, filed a suit for declaration that the order dated 14.2.1978, passed by the Assistant Collector I-Grade, S.D.O. (Civil), under the provisions of Redemption of Mortgages (Himachal Pradesh) Act, 1971, thereby ordering redemption of the mortgage of certain immovable property in favour of respondents No. 1 to 7, who were impleaded as defendants, was illegal, void and liable to be set aside, on account of two of the plaintiffs, namely Kauran Devi, the present appellant, and proforma respondent No. 9 Amar Nath, being minor at the time when the application for redemption was moved and though they were named as respondents in that application and their mother Smt. Rupan Devi was shown to be their guardian in the cause title, they were never represented by said Rupan Devi nor had the respondents / defendants applied for appointment of any other guardian ad litem of those minor plaintiffs.

3. Respondents No. 1 to 7 / contesting defendants did not deny that the present appellant and Amar Nath were minor when the application was moved, but alleged that their mother Rupan Devi had been duly served and since Rupan Devi was named as their guardian, it could not be said that the minors were not duly represented. However, it was not denied that Rupan Devi had not put in appearance. It may be stated that Rupan Devi, besides having been named as the guardian of the appellant and respondent Amar Nath, was impleaded as respondent in that application in her personal capacity also.

4. The trial Court, after framing issues and recording evidence of the parties, came to the conclusion that the minor plaintiffs were not duly

represented through a guardian in the application that was filed for redemption of the mortgage and, therefore, the order was illegal and void and consequently decreed the suit.

5. Respondents / defendants filed an appeal against the decree of the trial Court. The learned District Judge set aside the decree of the trial Court and dismissed the suit holding that no prejudice was shown to have been caused to the appellant and the other minor plaintiff and unless some prejudice was shown to have been caused, decree could not be said to be illegal and void in view of the provision of Rule 3A of Order 32 of the Code of Civil Procedure. The learned District Judge also observed that during the pendency of the application the present appellant as also respondent Amar Nath attained majority and, therefore, they were supposed to have approached the Assistant Collector for being heard in the matter.

6. I have heard the learned counsel for the parties and gone through the record.

7. It is not in dispute that the Act and the rules, under which the application for redemption of mortgage was made to the Assistant Collector, provide that where any of the petitioners or respondents is a minor, the provisions of Order 32 of the Code of Civil Procedure shall be applicable, meaning thereby that if any of the respondents happens to be a minor, the procedure prescribed in Order 32 of the Civil Procedure Code for appointment of guardian is required to be followed. In the present case two of the plaintiffs, i.e. the present appellant and respondent No. 9 Amar Nath, were admittedly minors when the application for redemption was moved. Their mother Rupan Devi was named as their guardian in the cause title. Rupan Devi herself had also been impleaded as respondent because of her

being a co-mortgagee with the aforesaid minor plaintiffs. Notice was sent to Rupan Devi. It appears that the service of the notice was accepted on her behalf by one of her major sons. However, Rupan Devi did not put in appearance before the Assistant Collector and was ordered to be proceeded against exparte. Now, when Rupan Devi had been ordered to be proceeded against exparte, the present appellant and respondent No. 9 Amar Nath can, by no stretch of imagination, be said to have been represented, leave alone duly represented, in the proceedings before the Assistant Collector. As a matter of fact, when Rupan Devi did not put in appearance despite service of notice through her major son, the respondents / defendants ought to have made an application for appointment of some other person as guardian of the minor plaintiffs. This is the prescribed procedure and the same was not followed. Not only this, there is nothing on the record suggesting that the notice, which was served upon Rupan Devi, was in her capacity as the guardian of the minor plaintiffs or in her own personal capacity, because she too had been impleaded as a respondent, as noticed hereinabove.

8. The reasoning given by the learned District Judge for reversing the findings and the decree of the trial Court is contrary to the provisions of law. Rule 3A of Order 32 of the Code of Civil Procedure, relied upon by the first Appellate Court, has no application to the facts of the case. The Rule says that no decree passed against a minor shall be set aside merely on the ground that the next friend or guardian for the suit of the minor had an interest in the subject matter of the suit adverse to that of the minor, but the fact that by reason of such adverse interest of the next friend or guardian for the suit, prejudice has been caused to the interests of

the minor, shall be a ground for setting aside the decree. Here it is not the case of the plaintiffs that their named guardian, i.e. their mother Rupan Devi, had any interest adverse to that of theirs and because of that they had been prejudiced. Their case is very plain and simple. They say that they were not represented by any guardian ad litem and, therefore, the order is void and illegal.

9. The reasoning given by the first Appellate Court that the appellant and the other minor respondent No. 9 themselves ought to have approached the Assistant Collector for being impleaded as party without representation by a guardian, on attainment of majority, is also contrary to the basic principles of jurisprudence. There is nothing on the record indicating that the minor plaintiff including the present appellant, were even aware of the institution of the application for the redemption of the mortgage. If they were not in the know of this fact, how could they be expected to approach the Assistant Collector to represent their case personally instead of through a guardian, on attainment of majority.

10. In view of the above stated position, the question, on which the appeal was admitted, is answered in favour of the appellant. Consequently the appeal is accepted, judgment and decree of the first Appellate Court are set aside and those of the trial Court are restored.

January 2, 2007 (BC) **(Surjit Singh)**
Judge